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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1352 114

GRACE MARSH,

Appellant,

vs.

THE STATE OF ALABAMA

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ALABAMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE COURT OF APPEALS OF ALABAMA

GRACE MARSH,

Appellant,

vs.

STATE OF ALABAMA,

Appellee

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM THE CASE

The appellee, believing that the matters set forth below, when considered in connection with what is set out in appellant's petition, will demonstrate the lack of substance in the questions raised by this appeal, files this its statement in opposition to appellant's statement as to the jurisdiction of the Supreme Court of the United States.

The appellee includes herein its motion to dismiss the appeal or in the alternative to affirm the judgment of the Court of Appeals of the State of Alabama on the ground that the questions raised on behalf of appellant are so unsubstantial as to require dismissal of the proceedings or an affirmance of the judgment of the State Court.

The matters here relied upon by appellee are more particularly stated below.

Statement of Case

This case was set in motion by an affidavit which was as follows:

"COMPLAINT

"THE STATE OF ALABAMA
"County of Mobile.

"Personally appeared before me, Wm. J. Kern, Clerk of the Inferior Criminal Court of Mobile County, A. I. Chatham, who, on being sworn, deposes and says that he has probable cause for believing, and does believe, that within the past 12 months Grace Marsh without legal cause or good excuse and after having been warned within the past six months not to do so, entered upon the premises of the Gulf Shipbuilding Corporation, a corporation contrary to law and against the peace and dignity of the State of Alabama, and prays for a warrant for the arrest of the said Grace Marsh.

"A. I. CHATHAM.

"Sworn to and subscribed before me this 27 day of December 1943.

"W. J. KERN,
"Clerk of the Inferior Criminal
"Court of Mobile County."

(Record in the lower court, page 1.)

A writ of arrest was issued on the foregoing affidavit returnable to the Judge of the Inferior Criminal Court of Mobile County, Alabama, and the appellant taken into custody thereon. (Record in the Lower Court, page 1.)

The appellant was arraigned, tried, and a judgment of guilty rendered in the case. (Record in the Lower Court, pages 2-3.) Appellant appealed from this judgment to the Circuit Court of Mobile County (Record, pages 2 and 3.) In the Circuit Court the appeal was tried on the original

affidavit without a jury and defendant found guilty by a judgment of the Court. Thereupon she took an appeal from this judgment to the Court of Appeals of the State of Alabama. (Record, pages 9-10.) The sole basis for the affidavit and charge against the defendant in the court below was for a violation of Title 14, Section 426 of the Code of Alabama of 1940. The material part of which is as follows:

> "Any person, who without legal cause or good excuse, enters into the dwelling house or on the premises of another; after having been warned, within six months preceding, not to do so * * * shall on conviction be fined not more than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than three months."

The record fails to show that the area owned by the Gulf Shipbuilding Corporation and the streets or roads and sidewalk where the offense was committed were ever incorporated as a municipality, and no claim to that effect has ever been claimed, nor is it connected in any way with any municipality. There is nothing in the record in the court below, which is made a part of appellant's petition, in any degree tending to show that the Gulf Shipbuilding Corporation undertook to pass any ordinance or rule and publish the same for the town of Chickasaw or that its property was within its corporate limits or jurisdiction, as appellant claims on page 2 of her petition in this proceeding. Making such a claim is wholly unfounded, and without any support from the record in the court below.

It is shown by the record below without dispute and brought into this proceeding that the appellant, when arrested, was on the sidewalk in front of the business block on these lands. (Record pages 17, 18.)

There is no denial that they were on the property and that they had been warned prior thereto not to come

upon it. The record below also shows that appellee was in possession of this entire area and this fact has never been disputed by the appellant. The record in the State Court below shows that the Gulf Shipbuilding Corporation repeatedly exercised its rights of ownership and possession and treated this area as its private property by requiring permission as to its use and some of its exercises of its rights are as follows:

The defendant with others was arrested on the property by an agent of the Shipbuilding Company. (Record page 17).

The following writing was posted on the property previous to the arrest.

"NOTICE

"THIS IS PRIVATE PROPERTY AND WITHOUT WRITTEN PERMISSION NO STREET OR HOUSE VENDOR, AGENT, OR SOLICITATION OF ANY KIND WILL BE PERMITTED.

"GULF SHIPBUILDING CORPORATION,
"HOUSING DIVISION."

That this notice was posted on several of the windows or different parts of the business houses, and that the defendant was arrested on the property. (Record pages 51, 49 and 17.)

The defendant was asked to leave the property with the statement that the Company did not allow any soliciting or selling without a permit, and she refused to do so. (Record pages 18 and 19.) The Ship Building Corporation's agent had arrested the appellant for trespass on another occasion. (Record pages 21-22.)

Peddlers, vendors, street sellers, agents, and all solicitors of every kind were requested to obtain written permission from the office of the Ship Building Company before being permitted to operate on the property. (Record

page 49.) And the appellant was again warned not to come upon the property. (Record page 50.)

The record further shows that the Gulf Shipbuilding Corporation was issuing notices to keep off the property without permits for more than a year before the Jehovah Witnesses began offering magazines on the property. (Record page 54.)

The property here involved belonged to the Tennessee Land Company in 1918, and they continued to own it for eighteen years when it was sold to Chickasaw Development Company and the latter company sold the property to the Gulf Shipbuilding Corporation. (Record page 80.) The Tennessee Land Company maintained control over the use of the property in that business area and the side-walk and roadway at all times during its ownership and required permits for selling and soliciting upon the premises. (Record page 84.) The Tennessee Land Company maintained officers and employees charged with the duty of policing the grounds. (Record page 86.) Nowhere in the record is it denied that the various owners of this property since 1918 held possession of all this property, sidewalks, roads and streets, and required permits from the Shipbuilding Company for the general public to enter thereon.

Contentions of the Parties

I

By Appellant:

That the statute of the State of Alabama (Title 14, Section 426 of the Code of Alabama) making it a crime to enter upon the premises of another after having been warned within six months preceding not to do so is in violation of the Federal Constitution guaranteeing freedom of speech and of religion because

(a) The statute on its face is violative of these constitutional provisions

(b) That as the State statute was construed by the State Court it is unconstitutional.

II

Petitioner further contends that admitting that the side-walk and road or street parallel therewith, on which the petitioner was at the time she was arrested were owned and possessed by the Gulf Shipbuilding Company, yet by reason of their use by the public the same had become a public side-walk and road.

III

Finally petitioner contends that whether this second proposition is true or not the petitioner had a constitutional right to be on the property for the purpose of propagating her religious beliefs by handing out magazines or pamphlets advocating the same.

By APPELLEE:

I

That the statute (Title 14, Section 426 of the Code of Alabama) was passed by the State Legislature in the exercise of its police powers.

II

That the First and Fourteenth Amendments to the United States Constitution by their language are limited solely to Federal and State action by way of forbidding the passage of any law respecting establishment of a religion or prohibiting the free exercise thereof or forbidding Federal or State agencies, acting under color of office, to so construe any law as to make it forbid or restrict the free exercise of religion.

III

That the constitutional provisions have other limitations. They are not to be so construed as to prohibit the passage

of a law by the State under its police power appropriately designed to reach and punish evils or to protect the property or persons of citizens.

IV

That the record shows that the place where petitioner was, at the time of arrest, was not a public place or highway.

V

At most the side-walk or road or street constituted no more than a way of necessity.

The appellee's contentions are fully supported by the following announced principles of law.

Propositions of Law One

The First and Fourteenth Amendments to the Constitution of the United States by their language are limited to Federal and State action by way of forbidding the passage of any law affecting the establishment of a religion or prohibiting the free exercise thereof and forbidding Federal or State agencies, acting under color of office, to construe any law so as to make it forbid or restrict the free exercise of religion.

Murdock v. *Pennsylvania*, 319 U. S. 105;
Jamason v. *Texas*, 318 U. S. 413;
Cantwell v. *Connecticut*, 310 U. S. 296;
Martin v. *City of Struthers*, 319 U. S. 141;
Largent v. *Texas*, 318 U. S. 418;
Carlson v. *California*, 210 U. S. 106;
Lovell v. *Griffin*, 303 U. S. 444.

Propositions of Law Two

That these constitutional provisions have other limitations. They are not to be so construed as to prohibit the

passage of a law by the State under its police power appropriately designed to reach and punish evils or to protect the property or persons of the citizens.

Sarah Prince v. *Massachusetts*, 321 U. S. 158;
Cantwell v. *Connecticut*, 310 U. S. 296;
Civil Rights Cases, 109 U. S. 17;
Fiedman's Lim. Pol. Pow. 190.

Propositions of Law Three

A public highway or place must be established in a regular proceeding for that purpose or by evidence showing it was generally used by the public continuously and uninterruptedly or by dedication of the owners of the soil and acceptance by the proper authorities.

District of Columbia v. *Roberson*, 180 U. S. 92;
Belleview Cemetery Company v. *McEvers*, 174 Ala. 457, 461.

Propositions of Law Four

To constitute dedication by prescription the roadway or place must be an open, defined roadway or place in continuous use by the Public as such without let or hindrance for a period of twenty years.

Irwin v. *Dixon*, 9 Howard 10, 30-33;
Central of Ga. Ry. Co. v. *Faulkner*, 217 Ala. 82, 84;
16 *Am. Jur.* (Dedication), § 16;
26 *C. J. S.* (Dedication), § 11.

Propositions of Law Five

To establish such a dedication the clearest intention on the part of the owners must be shown and the burden rests on the party, appellant here, claiming a right to the use thereof. To discharge this burden the evidence must be clear and cogent; the acts of the owners relied upon to es-

tablish a dedication must be convincing of an intent to dedicate the property to public use and such acts must be unequivocal to the intention to create a public right exclusive of the rights of the owner.

Town of Leeds v. *Sharp*, 218 Ala. 403, 405;
Locklin v. *Tucker*, 208 Ala. 155;
Irwin v. *Dixon*, 9 Howard 10, 30-33.

Propositions of Law Six

In case of doubt or uncertainty as to the character or use of a roadway or place it will be presumed that the use thereof was a permissive one.

Bellevue Gemetery Company v. *McEvers*, 168 Ala. 535.

Propositions of Law Seven

Where land conveyed is separated from a highway by grantor's lands and there is no established right-of-way for ingress and egress thereto, there arises by implication a way of necessity across the grantor's premises.

Hamby v. *Stepleton*, 221 Ala. 536;
17 *Am. Juris.* (Easements), Section 48, pages 959-960;
28 *C. J. S.* (Easements), Section 18, page 674.

Under the foregoing principles and Rule 12 of the Supreme Court of the United States appellee files the following motion to dismiss, or affirm the case.

Motion to Dismiss or Affirm the Case

Comes the appellee, by its attorney general, and files a motion to dismiss or in the alternative to affirm this cause on the following grounds:

1. The petition for an appeal fails to contain sufficient allegations to show that the Supreme Court of the United States has jurisdiction of this cause.

2. The petition and record in the Court of Appeals of Alabama, together with the adverse statement of matter or grounds making against the jurisdiction of the Supreme Court of the United States, filed herein by appellee, show a lack of jurisdiction to hear the cause.

3. The record fails to show that the place, side-walk or road where petitioner was trespassing was a public place or way within the meaning of the law.

4. The record shows that the premises on which petitioner was trespassing was the private property of a citizen and the legislation making it a crime to trespass thereon was duly passed under the exercise of the police power of the State.

WHEREFORE, appellee respectfully submits this statement and motion showing that the questions upon which the decision of this Court depends are so unsubstantial as to need no further argument, and appellee respectfully moves the Court to dismiss the appeal or in the alternative to affirm the judgment of the court below.

Respectfully submitted,

WILLIAM N. MCQUEEN,
Acting Attorney General.